Supreme Court, U.S.
FILED
FEB 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1256

In The
Supreme Court of the United States
October Term, 1985

MARIAN FLEMING COMSTOCK,
Appellant,

v.

HARRIS COUNTY, TEXAS,
Appellee.

On Appeal From The Court Of Appeals For The Fourteenth Supreme Judicial District of Texas At Houston

MOTION TO DISMISS OR AFFIRM

MICHAEL DRISCOLL
County Attorney

DAVID H. MELASKY
CHERYL HELENA CHAPMAN
Assistant County Attorney
Harris County, Texas
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-5101

Counsel for Appellee
Harris County, Texas

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTIONS INVOLVED

1. WHEN THE QUESTION PRESENTED BY APPELLANT IN THIS COURT WAS RAISED FOR THE FIRST TIME ON APPEAL IN THE MOTION FOR REHEARING AND WAS NEVER ADDRESSED BY THE STATE COURTS, HAS THE ISSUE BEEN PROPERLY PRESERVED FOR REVIEW BY THIS COURT?

2. WILL THIS COURT REVIEW A DECISION BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND?

3. WHETHER A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED IN AN EMINENT DOMAIN CASE BY A LANDOWNER WHO CONTENDS THAT HER FAILURE TO RECEIVE NOTICE OF THE FILING OF A SPECIAL COMMISSIONERS' AWARD IS A DENIAL OF DUE PROCESS, WHEN THE LANDOWNER AND HER ATTORNEY APPEARED AT THE SPECIAL COMMISSIONERS' HEARING AND WERE THEREBY PLACED UNDER A DUTY TO TAKE NOTICE OF SUBSEQUENT ACTS OF THE SPECIAL COMMISSIONERS AND THE FAILURE OF APPELLANT TO EXERCISE DUE DILIGENCE IN MONITORING THE CASE RESULTED IN HER FAILURE TO COMPLY WITH THE STATUTORY FILING PERIOD IN WHICH TO REQUEST JUDICIAL REVIEW?

TABLE OF CONTENTS

	Page
QUESTIONS INVOLVED	i
STATEMENT OF THE CASE	1
ARGUMENT	5
I. THE FEDERAL QUESTION WAS NOT PROPERLY PRESENTED IN TEXAS COURTS	5
II. AN ADEQUATE AND INDEPENDENT NON-FEDERAL GROUND EXISTS TO UPHOLD THE DECISION OF THE TEXAS COURT OF APPEALS	7
III. APPELLANT WAS NOT DENIED DUE PROCESS OR JUST COMPENSATION IN THE EMINENT DOMAIN PROCEDURES FOLLOWED IN THIS CASE	8
CONCLUSION	14

INDEX OF AUTHORITIES

Cases

Page

Bailey v. Anderson, 326 U.S. 203 (1945) 10

Bragg v. Weaver, 251 U.S. 57 (1919) 9, 11, 13

Determan v. City of Irving, Texas, 609 S.W.2d 565 (Tex.Civ.App.-Dallas 1980, no writ) 6

Dickey v. City of Houston, 494 S.W.2d 293 (Tex. Civ.App.-Houston [14th Dist.] 1973) writ ref'd. n.r.e. 501 S.W.2d 293 (Tex. 1973) 7, 8, 12

Fuller v. Oregon, 417 U.S. 40 (1974) 5, 7

Giannakos v. M/V Bravo Trader, 762 F.2d 1295 (5th Cir. 1985) 11

Harrell v. City of Denton, 116 S.W.2d 423 (Tex. Civ.App.-Ft. Worth 1938, no writ) 8, 12

Holloway v. County of Matagorda, 686 S.W.2d 100 (Tex. 1985) 6

Joiner v. City of Dallas, 380 F. Supp. 754 (N.D. Tex. 1974), affirmed 419 U.S. 1042 (1974) 10, 13

Jones v. Estelle, 693 F.2d 547 (5th Cir. 1982), cert. denied, 460 U.S. 107, 103 S.Ct. 1528, 75 L.Ed.2d 950 (1983) 12

Kramer v. American Postal Workers Union, AFL-CIO, 556 F.2d 929 (9th Cir. 1977) 12

Memphis Natural Gas Co. v. Beeler, 315 U.S. 649 (1942) 5

Murdock v. City of Memphis, 20 Wall (87 U.S.) 590, 22 L.Ed. 429 (1875) 7

North Laramie Land Company v. Hoffman, 268 U.S. 276 (1925) 10, 11, 13

Pearson v. State, 315 S.W.2d 935 (Tex. 1958) 7

P G P Gas Products, Inc. v. Fariss, 620 S.W.2d 559 (Tex. 1981) 6

INDEX OF AUTHORITIES—Continued

Page

Pila v. G.R. Leasing and Rental Corp., 551 F.2d 941 (1st Cir. 1977) 11

Smart v. Texas Power and Light Co., 525 F.2d 1209 (5th Cir. 1976), reh. den. 528 F.2d 928, cert. den. 429 U.S. 826 (1976) 10

State v. Lee, 346 S.W.2d 498 (Tex.Civ.App.-Waco 1961) rev'd 352 S.W.2d 724 (Texas, 1962) 11

Street v. New York, 395 U.S. 576 (1969) 7

Svoboda v. State, 612 S.W.2d 229 (Tex.Civ.App.-Tyler 1981, no writ) 8

Trice Production Co. v. Dutton Drilling Co., 333 S.W.2d 607 (Tex.Civ.App.-Houston 1960, ref. n.r.e) 6

United Postage Corp. v. Kammeyer, 581 S.W.2d 716 (Tex.Civ.App.-Dallas 1979, no writ) 6

U.S. v. 131.68 Acres of Land, More or Less, Etc., 695 F.2d 872 (5th Cir. 1983) cert. denied 104 S.Ct. 77 10

Walker v. City of Hutchinson, 352 U.S. 112 (1956) 11

Wood v. Wood, 320 S.W.2d 807 (Tex. 1959) 6

STATUTES AND RULES

Tex.Rev.Civ.Stat.Ann. art. 3264 (Vernon 1968) (Repealed 1983) 2, 10

Tex.Rev.Civ.Stat.Ann. art. 3265 (Vernon 1968) (Repealed 1983) 2

Tex.Rev.Civ.Stat.Ann. art. 3266 (Vernon 1968) (Repealed 1983) 2, 7

Tex.Rev.Civ.Stat.Ann. art. 3268 (Vernon 1968) (Repealed 1983) 10

Federal Rules of Civil Procedure, Rule 77(d) 12, 13

Vernon's Texas Codes Ann., Property Code § 21.019 13

United States Supreme Court Rule 16.1(b) 7

No. 85-1256

In The

Supreme Court of the United States

October Term, 1985

MARIAN FLEMING COMSTOCK,

Appellant,

v.

HARRIS COUNTY, TEXAS,

Appellee.

On Appeal From The Court Of Appeals For The Fourteenth Supreme Judicial District of Texas At Houston

MOTION TO DISMISS OR AFFIRM

Appellee County of Harris moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Texas Court of Appeals, on appeal pursuant to 28 U.S.C. § 1257(2).

STATEMENT OF THE CASE

The case at bar is an appeal from a bill of review proceeding which was tried in the County Civil Court at Law

of Harris County, Texas. The underlying controversy involves the condemnation by Appellee, Harris County, Texas, of certain lands owned by Appellant, Marian Fleming Comstock, for use as a public road. Pursuant to the Texas statutes governing eminent domain, a suit in condemnation was filed by Appellee in the County Civil Court at Law of Harris County, Texas. (Cause No. 406,942)

In accordance with Tex. Rev. Civ. Stat. Ann. arts. 3264, 3265 and 3266 (Vernon 1968) (Repealed 1983), three special commissioners were appointed by the court to hold a hearing and assess the amount of compensation due the landowner. The special commissioners held a hearing on July 20, 1982 which hearing was attended by Appellant and her Attorney. On July 22, 1982 the special commissioners filed an Award with the Court assessing the sum of $208,531.00 as compensation for the taking. Upon the filing of this Award, any party to the suit could obtain a civil trial by filing an objection to the award with the County court on or before the Monday following the 20th day after the award was filed with the court. This requirement is jurisdictional. In the absence of the timely filing of an objection, the award of the special commissioners will become the basis for a Judgment of the County Court.

It is undisputed that no objection to the award was filed in Cause No. 406,942 by either Appellant or by any other party to the suit within the time allowed by Art. 3266, Tex. Rev. Civ. Stat. Ann. Accordingly, after the expiration of the statutory period for filing objections, Harris County moved the trial court to enter a Judgment on the Award. During the pendency of this motion for Judgment on the Award, Appellant filed a new action in the County Civil Court at Law (Cause No. 412,886) seeking a

bill of review which would set aside any judgment entered in Cause No. 406,942. On September 23, 1982 the trial court entered a Judgment on the Award in Cause No. 406,942.

Although Appellant now contends that entry of the September 23, 1982 Judgment deprived her of her right to due process and just compensation, these allegations were never raised in the trial court either in opposition to the motion for entry of Judgment on the Award or in support of her petition for a bill of review. Assuming *arguendo* that these allegations had any merit, the trial court should have been alerted to the purported constitutional defects in the proceedings and thereby allowed the opportunity to enter any orders necessary to correct the asserted error. Appellant, however, failed to afford the trial court with any opportunity to rule on these issues. No appeal was taken from the September 23, 1982 judgment.

In the bill of review proceeding, Appellant was required to prove the existence of circumstances which the Texas courts have determined to be sufficient to invoke the equitable jurisdiction of the county court when a party fails to timely file objections to an award of the special commissioners. The criteria for determining such circumstances are inherently a creature of Texas law. In her bill of review, Appellant, through both pleadings and evidence, sought solely to show the county court that her situation justified the granting of a bill of review according to the Texas case law governing same. Appellant contended that, although it was undisputed that both she and her attorney attended the special commissioners hearing and that on or before July 26, 1982 the Award of the special commissioners was filed with the clerk of the court as part of the public records of the court, her failure to receive notice of the filing of the award, irrespective of the lack of

evidence of any effort on her part to contact the clerk and determine the status of the case, justified her request for a bill of review. The trial court granted the bill of review on October 18, 1983 and a jury trial on the issue of compensation resulted in a verdict of $308,655.00.

Upon appeal by Harris County from the Judgment based on this jury verdict, the Texas Court of Appeals for the Fourteenth Supreme Judicial District held that the evidence submitted to the County court was, as a matter of law, not sufficient to invoke the equitable jurisdiction of the trial court and that the granting of the bill of review was reversible error.[1] The Court of Appeals, therefore, reversed the judgment in Cause No. 412,886 and rendered the judgment entered on September 23, 1982. Appellant did not raise any constitutional question in the court of appeals at any time prior to the decision of the court.

Appellant Comstock filed a motion for rehearing in the Court of Appeals in which for the first time there was

---

1 Specifically, the Court of Appeals noted the following:

> "A thorough examination of evidence offered by appellee at the bill of review hearing reveals appellee wholly failed to establish the existence of fraud to the degree necessary to warrant a bill of review. The only evidence appellee offered on the issue of fraud was testimony of her attorney that certain parties had indicated the matter could be expedited. No evidence was offered as to the identity of the speaker or his intent in making the statement. Further, appellee failed to explain how this statement would prevent her from filing a timely objection to the award. *See Swaim*, 590 S.W.2d at 789. To the contrary, such a statement would more reasonably indicate the need to file objections well in advance of the normal deadline, not later.
>
> A review of the record revealed no evidence that would entitle appellee to relief by means of a Bill of Review."

See App. A, page 4a of Appellant's Jurisdictional Statement.

asserted to be constitutional defects in the proceedings. The motion for rehearing was denied without comment as was the application for writ of error filed with the Texas Supreme Court.

———o———

ARGUMENT

I.

THE FEDERAL QUESTION WAS NOT PROPERLY PRESENTED IN TEXAS COURTS

This Court has held that no appellate jurisdiction will lie over a federal claim not properly drawn into question in state court or deemed by that state's highest court to be in issue. *Memphis Natural Gas Co. v. Beeler,* 315 U.S. 649, 62 S.Ct. 857, 86 L.Ed. 1090 (1942); *Fuller v. Oregon,* 417 U.S. 40, 50 n. 11, 94 S.Ct. 2116, 2123 n. 11, 40 L.Ed.2d 642 (1974).

The federal question in the case at bar was not properly presented in the Texas state courts. Appellant decisively waived her right to complain of alleged due process violations when she failed to raise the issue prior to the entry of the judgment on the award or in her petition for bill of review. During no stage of the lower court proceedings was the unconstitutionality of the eminent domain statutes asserted. It was not until after a full briefing on the merits, oral arguments and an adverse appellate decision, that Appellant asserted for the first time, in a motion for rehearing, her contentions of constitutional infirmities. The Court of Appeals overruled her motion without comment, and the Texas Supreme Court, also without comment, refused her application for writ of error.

The general rule in Texas is that the constitutionality of a statute will not be considered by appellate courts when the question is presented for the first time on appeal.[2] *Wood v. Wood,* 320 S.W.2d 807 (Tex., 1959); *United Postage Corp. v. Kammeyer,* 581 S.W.2d 716 (Tex.Civ.App.—Dallas 1979 no writ); *Trice Production Co. v. Dutton Drilling Co.,* 333 S.W.2d 607 (Tex.Civ.App.—Houston 1960 writ ref. n.r.e.).

The Texas Supreme Court has directly addressed challenges to condemnation proceedings, and has held repeatedly that such challenges must be preserved at the trial level in order to form the predicate for complaint on appeal. *P G P Gas Products, Inc. v. Fariss,* 620 S.W.2d 559 (Texas, 1981); *Holloway v. County of Matagorda,* 686 S.W.2d 100 (Texas, 1985).

Both the Texas Court of Appeals and the Texas Supreme Court were silent on Appellant's due process contentions. Nevertheless, through their silence, the Texas courts have said that a substantial issue was not presented which would have justified their review. Where a state court has been silent on a federal question, this Court will assume that such silence was due to want of proper presen-

---

2 The fundamental error rule is the exception to the general rule that Texas appellate courts will not consider constitutional issues presented for the first time on appeal. Under the fundamental error rule, appellate courts *may* consider constitutional challenges to a statute which were not raised at the lower level, if (1) the statute's unconstitutionality is obvious and apparent; or (2) the statute is of sufficient public interest to justify consideration. *Determan v. City of Irving, Texas,* 609 S.W.2d 565 (Tex.Civ.App.—Dallas 1980, no writ). Since neither the Court of Appeals nor the Texas Supreme Court addressed Appellant's due process claim, it goes without saying, that no fundamental error was found.

tation unless the appellant can show to the contrary. Appellant has not done so. *Street v. New York,* 394 U.S. 576 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); *Fuller v. Oregon, supra.* Accordingly, the jurisdictional predicate for appellate review by this court is lacking.

II.

AN ADEQUATE AND INDEPENDENT NON-FEDERAL GROUND EXISTS TO UPHOLD THE DECISION OF THE TEXAS COURT OF APPEALS

The Supreme Court has consistently adhered to the principle that it will not review a state court judgment based on an adequate and independent non-federal ground. Supreme Court Rule 16.1(b); *Murdock v. City of Memphis,* 20 Wall (87 US) 590, 22 L.Ed. 429 (1875).

The Court of Appeals decision to reinstate the award of the special commissioners rests on substantive state grounds. The applicable law governing appeals in eminent domain proceedings is explicit: when no timely objections have been filed, the court has the ministerial duty of entering judgment on the award and no appeal may be taken therefrom. Tex. Rev. Stat. Ann., art. 3266 (Repealed); *Pearson v. State,* 325 S.W.2d 935 (Texas, 1958); *Dickey v. City of Houston,* 501 S.W.2d 293 (Texas, 1973).

Appellant sought relief from the judgment by the equitable remedy of bill of review. However, her argument that failure to receive notice of the filing of the award excused noncompliance with the statutory deadline, is not one recognized under Texas Law. The courts have held without exception that lack of notice of the entry of the award by itself does not support a bill of review.

Dickey v. City of Houston, supra; Harrell v. City of Denton, 116 S.W.2d 423 (Tex.Civ.App.—Fort Worth 1939, no writ); *Svoboda v. State,* 612 S.W.2d 229 (Tex.Civ.App.—Tyler 1981, no writ). Having appeared and participated in the special commissioners hearing, Appellant was under a continuing obligation to keep herself informed of the subsequent acts of the commissioners. *Dickey v. City of Houston, supra.*

While allegations of fraud, mistake or accident will invoke equitable review powers, the Texas Court of Civil Appeals found no evidence to support Appellant's contention that the judgment was entered through fraud, mistake or accident. Therefore, the Texas Court of Civil Appeals appropriately reversed the trial court judgment and reinstated the award of the special commissioners based on the principles governing bills of review in Texas—a reason independent of federal law and completely adequate and sufficient under Texas law.

III.

APPELLANT WAS NOT DENIED DUE PROCESS OR JUST COMPENSATION IN THE EMINENT DOMAIN PROCEDURES FOLLOWED IN THIS CASE

The Texas eminent domain statutes afford a landowner due process by requiring a hearing of three special commissioners to determine compensation prior to the taking of property and by requiring that notice of the special commissioners hearing be personally served on the landowner. In the case at bar it is undisputed that both the landowner and her attorney made an appearance in this cause by attending the special commissioner's hearing and thereby any complaint based on failure to receive notice

was waived. Having appeared, it became the duty of Appellant, as in any civil action, to exercise due diligence in monitoring the progress of the litigation and the failure of Appellant to meet a filing deadline due to the lack of such diligence does not constitute a denial of due process.

ARGUMENT

The requisite dictates of due process in an eminent domain proceeding were discussed by this Court in *Bailey v. Anderson,* 326 U.S. 203, 66 S.Ct. 66, 90 L.Ed. 3 (1945). The case involved a review of the Virginia eminent domain procedures which allowed for the taking of land for public use prior to a hearing on compensation and prior to the payment of compensation to the property owner. In holding that this procedure was not constitutionally infirm, this Court stated the following:

> "But it has long been settled that due process does not require the condemnation of land to be in advance of its occupation by the condemning authority, provided only that the owner have opportunity, in the course of the condemnation proceedings, to be heard and to offer evidence as to the value of the land taken. *Bragg v. Weaver,* 251 U.S. 57, 62, 40 S.Ct. 62, 64, 64 L.Ed. 135, and cases cited; *Joslin Mfg. Co. v. City of Providence,* 262 U.S. 668, 677, 43 S.Ct. 684, 688, 67 L.Ed. 1167; *State of Georgia v. City of Chattanooga,* 264 U.S. 472, 483, 44 S.Ct. 369, 371, 68 L.Ed. 796. Its value may be fixed by viewers without a hearing, after entry upon the land, if their award is subject to a review in which a trial upon evidence may be had. *Pearson v. Yewdall,* 95 U.S. 294, 296, 24 L.Ed. 436; *Backus v. Fort Street Union Depot Co.,* 169 U.S. 557, 569, 18 S.Ct. 445, 450, 42 L.Ed. 853; *Bragg v. Weaver, supra,* 251 U.S. 59, 40 S.Ct. 63, 64 L.Ed. 135,

and cases cited; *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 284, 285, 45 S.Ct. 491, 495, 69 L.Ed. 963."

326 U.S. at 205, 66 S.Ct. at 67.

See also *U.S. v. 131.68 Acres of Land, More or Less, Etc.*, 695 F.2d 872, 875 (5th Cir. 1983) cert. denied, 464 U.S. 817, 104 S.Ct. 77 (1983).

In contrast to the procedures described in *Bailey*, the Texas statutes on eminent domain which were applicable to the instant cause provided the landowner with both a hearing prior to the taking and required the tender of compensation as a condition precedent to the actual possession of the property by Harris County. *See* Tex. Rev. Civ. Stat. Ann. art. 3264 §§ 2, 3, 4, 5 and 6 and 3268 (Vernon 1968) (Repealed 1983). Federal courts have twice in recent years scrutinized the Texas eminent domain statutes for constitutionality and found them to pass muster. A broadside attack against the entire statutory scheme was entertained by a three judge panel in *Joiner v. City of Dallas*, 380 F.Supp. 754 (N.D. Texas, 1974), *affirmed* 419 U.S. 1042, 95 S.Ct. 614, 42 L.Ed.2d 637 (1974) and no constitutional infirmity was found. In *Smart v. Texas Power & Light Co.*, 525 F.2d 1209 (5th Cir. 1976) reh. den. 528 F.2d 928 cert. denied, 429 U.S. 826 (1976), the Fifth Circuit upheld the constitutionality of allowing possession by the condemnor upon deposit of the special commissioner's award.

In the case *sub judice*, Appellant does not dispute the fact that she and her attorney both attended the hearing at which the Special Commissioners determined the amount of compensation which would be necessitated by the taking of the subject property. It is therefore clear that the

cases relied on by Appellant, *Bragg v. Weaver,* 251 U.S. 57, 40 S.Ct. 62, 64 L.Ed. 135 (1919) and *North Laramie Land Company v. Hoffman,* 268 U.S. 276, 45 S.Ct. 491, 69 L.Ed. 953 (1925), are distinguishable from the instant cause. In both *Bragg* and *North Laramie* the question before the court was whether the landowner had received adequate notice of the commencement of eminent domain proceedings at which just compensation would be determined. In both cases this court held that a landowner must be afforded notice of a commencement of the hearing at which compensation will be determined. See also *Walker v. Hutchinson,* 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed. 2d 178 (1956).

Furthermore, it is settled law that appearance in a proceeding waives any right to complain about notice. Texas courts have specifically held that appearance at a special commissioners hearing will waive any complaint as to lack of service. *State v. Lee,* 346 S.W.2d 498 (Tex.Civ. App.—Waco, 1961) reversed on other grounds 352 S.W.2d 724 (Tex. 1962). Similarly the Federal Rules provide that an appearance will waive service. *Pila v. G. R. Leasing and Rent Corp.,* 551 F.2d 941 (1st Cir. 1977), *Giannakos v. M/V Bravo Trader,* 762 F.2d 1295 (5th Cir. 1985). Thus by appearing at the Special Commissioners hearing, Appellant waived any right to complain about lack of notice of the eminent domain proceedings.

Having appeared in the condemnation proceeding, Appellant was under a continuing duty to apprise herself of the status of the proceedings. The award of the special commissioners was filed with the clerk of the court and became part of the record of the county court and thus available for public inspection. The duty that is imposed on par-

ties to a condemnation proceeding was specifically set forth by the Texas Supreme Court in *Dickey v. City of Houston*, 501 S.W.2d 293 (Tex., 1973) wherein the court stated the following:

> "In this instance petitioners' motion in the trial court appears to be merely an attempt to have the judgment set aside on the ground that it is void because petitioners were not notified of the filing of the commissioners' decision. There is no merit in this contention. The record shows that petitioners were duly notified of and appeared at the commissioners' hearing. It was then their duty to take cognizance of the subsequent acts of the commissioners. They were chargeable with notice that it was the duty of the commissioners to make an award and return it as provided by law, and that the judge would cause it to be entered in the minutes as the judgment of the court unless timely objections were filed. See *Harrell v. City of Denton*, Tex.Civ.App., 116 S.W.2d 423 (no writ)."

Id. at 294.

A similar duty is placed on federal litigants by Rule 77(d) of the Federal Rules of Civil Procedure which specifically notes that the time for appeal is not affected by lack of notice of the entry of the judgment by the clerk. In *Jones v. Estelle*, 693 F.2d 547 (5th Cir. 1982) cert. denied 460 U.S. 107, 103 S.Ct. 1528, 75 L.Ed.2d 950 (1983), the Fifth Circuit specifically noted in regard to Fed. R. Civ. P. Rule 77(d) that "underlying the rule is the implicit burden on the party and the counsel to make 'periodic inquiries' into the course of the proceedings." 693 F.2d at 549. See also *Kramer v. American Postal Workers Union, AFL-CIO*, 556 F.2d 929 (9th Cir. 1977).

In the case at bar, Appellant and her attorney attended the special commissioners hearing and this appear-

ance constituted a waiver of any failure to receive notice.[3] The assertions of due process raised by Appellant are not akin to the landowners who were arguably unaware of the commencement of proceedings as in *Bragg* and *North Laramie, supra,* but are an attempt to clothe in the garments of due process the naked failure of Appellant to diligently monitor the case, a duty imposed on litigants by the Texas courts and by this court through the adoption of Fed. R. Civ. P. Rule 77(d).[4] Under the Texas statutes,

---

3 It should be noted that Appellant is not an unsophisticated individual, naive to the procedures of eminent domain. The July 20, 1985 Special Commissioners hearing was the second Special Commissioners hearing held in this cause. Appellant did not appear at the first hearing. Upon the taking of possession of the subject property by Harris County, Appellant filed a suit in a Texas District Court for injunctive relief alleging lack of notice of the hearing. The second Special Commissioners hearing was held after an agreed injunction had been entered which prohibited the County from taking possession based on the earlier Special Commissioners hearing.

4 Appellant argues strenuously that the enactment by the legislature of Art. 21.019 of the Texas Property Code, which requires the clerk of the court to send notice of the filing of the special commissioners award, somehow indicates that the earlier statutory proceeding was unconstitutional. By this argument, appellant has ignored the admonitions of the three Judge panel in *Joiner v. City of Dallas, supra,* wherein the limits of constitutional scrutiny were described as follows:

> We recognize, of course, that the constitutional requirements of due process and equal protection are not necessarily static concepts. Neither, on the other hand, are they protean labels capable of encompassing every desirable innovation and improvement. Even viewed through a 1974 prism, the Constitution does not purport to correct every wrong; and though it is the Supreme Law of the Land, the

(Continued on following page)

Appellant received both a hearing on fair market value and compensation in advance of the taking of her land. These procedures went far beyond the constitutional minimums. The due process dictates having been satisfied by the special commissioners hearing, there does not exist a substantial federal question.

———o———

CONCLUSION

For the foregoing reasons Harris County respectfully submits that the state statutes challenged by Appellant were not specifically reviewed by the State Courts and that the Texas Court of Appeals had an adequate independent state ground for its decision. Furthermore, Appellant has failed to present a substantial federal qeustion which this Court should entertain. The appeal herein should, there-

---

(Continued from previous page)

> rights its secures to citizens constitute the bedrock of our legal system, not the summit.

380 F. Supp. at 779. The court further noted that to pass constitutional muster, a condemnation statute need only "insure to property owners their minimum rights under well-established interpretations of the Fourteenth Amendment. We cannot compel more than this, for the Constitution, is not a blueprint for the heavenly city." *Id.* at 779. The fact that the legislature in 1983 added certain provisions to protect parties from their own negligence does not *ipso facto* render the earlier statute constitutionally defective.

fore, be dismissed or in the alternative, the judgment of the Texas Court of Appeals affirmed.

Respectfully submitted,

MICHAEL DRISCOLL
County Attorney

DAVID H. MELASKY
CHERYL HELENA CHAPMAN
Assistant County Attorneys
Harris County, Texas
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-5101

Counsel for Appellee
Harris County, Texas